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13-04225-BDL Meridian Sunrise Village LLC v. NB Distressed Debt Investment Fund Limited et al

Type: ap	Office: 3 (Tacoma)	Judge: BDL
Lead Case: 3-13-bk-40342	Case Flag: Appeal	

U.S. Bankruptcy Court

Western District of Washington

Notice of Electronic Filing

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Case Name:	Meridian Sunrise Village LLC v. NB Distressed Debt Investment Fund Limited et al
Case Number:	13-04225-BDL
Document Number:	56

Docket Text:
Supplemental Transmittal of Motion and Declaration for Leave to Appeal to USDC. Appeal BK Internal Appeal Number 13-T003. USDC Number 13-CV-5503. (Related document(s)[54] Motion for Leave to Appeal, [55] Declaration). (PSB)

The following document(s) are associated with this transaction:

13-04225-BDL Notice will be electronically mailed to:

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Appeal

U.S. Bankruptcy Court
Western District of Washington (Tacoma)
Adversary Proceeding #: 13−04225−BDL

Assigned to: Brian D Lynch
Lead BK Case: 13−40342
Lead BK Title: Meridian Sunrise Village LLC
Lead BK Chapter: 11
Demand:
Nature[s] of Suit: 72 Injunctive relief − other
91 Declaratory judgment

Date Filed: 05/23/13

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Filing Date	#		Docket Text
06/25/2013		54	Emergency Motion for Leave to Appeal *&for Stay of Preliminary Injunction*. Filed by Hunter O Ferguson on behalf of N.B. Distressed Master Fund, L.P., NB Distressed Debt Investment Fund Limited, Strategic Value Special Situations Master Fund II LP. Leave to Appeal Response due: 07/10/2013. (Ferguson, Hunter) (Entered: 06/25/2013 at 15:54:36)
06/25/2013		55	Declaration *of David Levant ISO Funds' Emergency Motion for Leave to Appeal &Stay of Injunction* (Related document(s)54 Motion for Leave to Appeal). Proof of Service. Filed by Hunter O Ferguson on behalf of N.B. Distressed Master Fund, L.P., NB Distressed Debt Investment Fund Limited, Strategic Value Special Situations Master Fund II LP. (Attachments: # 1 Exhibit 1−Preliminary Injunction Order # 2 Exhibit 2−Certified Transcript) (Ferguson, Hunter) (Entered: 06/25/2013 at 16:02:11)

HONORABLE BRIAN D. LYNCH

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In re: MERIDIAN SUNRISE VILLAGE, LLC, Debtor.	BANKRUPTCY NO. 13-40342-BDL ADVERSARY NO. 13-04225-BDL INTERNAL APEAL NO. T-003 USDC NO. 13-CV-5503RBL
MERIDIAN SUNRISE VILLAGE, LLC, Plaintiff, v. NB DISTRESSED DEBT INVESTMENT FUND LIMITED; N.B. DISTRESSED MASTER FUND, L.P.; STRATEGIC VALUE SPECIAL SITUATIONS MASTER FUND II, L.P.; BANK OF AMERICA NATIONAL ASSOCIATION; and U.S. BANK NATIONAL ASSOCIATION, Defendants.	FUNDS' EMERGENCY MOTION FOR LEAVE TO APPEAL AND FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

Defendants NB Distressed Debt Investment Fund Limited, NB Distressed Debt Master Fund LP and Strategic Value Special Situations Master Fund II, L.P. (collectively, the "***Funds***") hereby move the Court (i) pursuant to 28 U.S.C. § 158(a) and Fed. R. Bankr. P. 8003 for leave to appeal from a Preliminary Injunction issued by the U.S. Bankruptcy Court for the Western

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District of Washington at Tacoma (the "***Bankruptcy Court***"), and (ii) to stay the Preliminary Injunction, if necessary, pursuant to Fed. R. Bankr. P. 8005 to allow the Funds to vote on confirmation of the plan of reorganization (as the same may be amended, the "***Plan***") of the Plaintiff and Debtor Meridian Sunrise Village, LLC ("***Debtor***").

Leave to appeal should be granted because the Bankruptcy Court erred as a matter of law in ruling that the Funds are not "financial institutions" for purposes of acquiring a 26.67% interest in a $54,900,000 claim against the Debtor. Based on such error, the Bankruptcy Court barred the Funds from voting on the Plan, which is set for a confirmation hearing on Thursday and Friday, June 27 and 28 (the "***Confirmation Hearing***"). As set forth below, the Funds will suffer irreparable harm if they are disenfranchised at the Confirmation Hearing.

Additionally, in light of the fast-approaching Confirmation Hearing and to prevent irreparable harm to the Funds, a stay of the Preliminary Injunction is warranted, until this Court can rule on the Funds' request for leave to appeal and, if leave is granted, until the appeal is resolved. The Funds applied to the Bankruptcy Court for stay of the Preliminary Injunction or Continuance of the Confirmation Hearing, requesting a ruling by June 24. As the Bankruptcy Court has not yet ruled on that motion, relief from this Court is warranted.

I. STATEMENT OF FACTS

The essential pertinent facts are undisputed. To underscore this point, the background information in Parts A and B of this Statement of Facts is drawn entirely from the First Amended Disclosure Statement for Debtor's First Amended Plan of Reorganization (Bankr. Doc. 75; the "***Disclosure Statement***"), Debtor's Adversary Complaint (Adv. Pro. Doc. 1; the "***Complaint***"), its Motion for Preliminary Injunction or Temporary Restraining Order (Adv. Pro. Doc. 2; the "***Motion for PI/TRO***"); and related Declarations and Exhibits (Adv. Pro. Docs 4-1-4-9).

Part C details matters of record in the Debtor's bankruptcy case that also should be undisputed. Certain of these facts have occurred since entry of the Preliminary Injunction and bear on the risk of irreparable harm and need for emergency relief.

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A. Debtor, the Loan, the "Eligible Assignee" Definition and Bankruptcy

Debtor owns the Sunrise Village, a shopping center located in the South Hill neighborhood of Puyallup. Construction of the shopping center was financed in part through a series of loans from U.S. Bank National Association ("***US Bank***"), including a primary loan (the "***Loan***") of up to $75 million by US Bank pursuant to a certain "Loan Agreement (Vertical Construction)" dated as of April 4, 2008 (as amended, the "***Loan Agreement***") naming US Bank as Administrative Agent (the "***Agent***").

US Bank and Debtor contemplated that portions of the Loan would be assigned to other lenders ("***Lenders***"), which the Loan Agreement required to be "Eligible Assignee[s]" – a term defined in the Loan Agreement to mean in relevant part: "any commercial bank, insurance company, financial institution or institutional lender approved by Agent in writing." *See* Loan Agreement § 1.1 (Adv. Pro. Doc. 4-1 at 9).

Shortly after the Loan was made, US Bank assigned 26.67% of the Loan to Bank of America, N.A. ("***BofA***") and 20% of the Loan to each of Citizens Business Bank ("***Citizens***") and Guaranty Bank ("***Guaranty***"), retaining 33.33% of the Loan for itself. *See* Complaint ¶¶ 17, 20 (Adv. Pro. Doc. 1 at 4).

The Loan had an initial maturity date of October 4, 2009, which was subsequently extended pursuant to a series of amendments to June 25, 2013. *See* Disclosure Statement § II.A.3.a. (Bankr. Doc. 75 at 4). In Spring 2012 the Loan was declared in default as a result of a financial covenant breach, but Debtor was nevertheless allowed to continue to accrue and pay interest at a relatively low LIBOR-based rate of interest, rather than a "Default Rate" of interest five percentage points higher. *See id.* § II.A.3.b (Bankr. Doc. 75 at 5-6).

In Fall 2012 US Bank requested that Debtor approve a Sixth Amendment to the Loan Agreement that would revise the definition of "Eligible Assignee" to, in essence, "any Person . . . approved by Agent in writing." *See* Emails between Chris Brain and James Gradel, dated Oct. 30 and Nov. 6, 2012, and Attachments (Adv Pro. Docs. 4-4 at 2, 4-5 at 1). Debtor refused

to agree to the change, following which, on January 9, 2013, US Bank, acting as Agent for the "Required Lenders," gave notice to Debtor that the Loan would begin to accrue interest at the Default Rate. *See* Letter from Christopher Zumberge to Meridian Sunrise Village, L.L.C., dated Jan. 9, 2013 (Adv. Pro. Doc. 4-6). In response, Debtor commenced its bankruptcy case (the "***Bankruptcy Case***"). Dec. of Martin Waiss at 4, ¶ 21 (Adv. Pro. Doc. 4).

The Loan totaled approximately $54,900,000 on Debtor's January 18, 2013 bankruptcy petition date. *See* Disclosure Statement § III.B.1.b. (Bankr. Doc. 75 at 8). Since the petition date Debtor has continued to operate as a debtor in possession and the Lenders have entered into a series of consensual "cash collateral orders" allowing Debtor to use rents generated from the shopping center to pay its operating expenses and professional fees. *Id.* § II.B. (*id.* at 6:7-15). The shopping center is about 75% occupied and profitable when paying interest on the Loan at the note rate. *Id.* § II.A.1. (*id.* at 3:4-7).

B. The Loan Assignment, Adversary Proceeding and Preliminary Injunction

On March 25, 2013 BofA assigned its interest in the Loan to NB Distressed Debt Investment Fund Limited, which shortly thereafter assigned one half of its interest (*i.e.*, 13.33% of the Loan) to Strategic Value Special Situations Master Fund II, L.P. and 2.76% of the Loan to NB Distressed Debt Master Fund LP. *See* Email from Christopher Zumberge to Mike Corliss, dated Mar. 25, 2013 (Adv. Pro. Doc. 4-7); email from James Gradel to Chris Brain, dated Apr. 3, 2013 (Adv. Pro. Doc. 4-8).

On April 3, 2013 Debtor reserved its rights to contest the assignments of BofA's interest in the Loan to the Funds and asserted that the Funds were not Eligible Assignees. *See* Email from Chris Brain to James Gradel, dated Apr. 3, 2013 (Adv. Pro. Doc. 4-9 at 1). Debtor's adversary proceeding against the Funds, BofA and US Bank and its Motion for PI/TRO followed on May 23. In its Adversary Complaint and accompanying Motion for Preliminary Injunction, Debtor sought a declaratory judgment that none of the Funds qualifies as an Eligible Assignee under the terms of the Loan Agreement and an injunction barring the Funds from exercising the

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rights of Eligible Assignees. *See* Complaint at ¶ 26 (Adv. Pro. Doc. 1 at 5); Motion for PI/TRO at 10 (Adv. Pro. Doc. 2 at 10).

The Bankruptcy Court subsequently issued a Preliminary Injunction against the Funds, ordering that the Funds "are ENJOINED from exercising their rights under Paragraph 12.9(b) [of the Loan Agreement][1] or 11 U.S.C. § 1126 in conjunction with the casting of ballots or votes in regard to the confirmation of Debtor's Plan of Reorganization." The Bankruptcy Court explained that whether the Funds qualified as "Eligible Assignees" turned on whether they are "financial institutions" under the definition of an "Eligible Assignee" in the Loan Agreement. *See* Tr. at 11:8-12:2 (Adv. Pro. Doc. 47). The Bankruptcy Court concluded, as a matter of law, that the Funds are not "financial institutions" for such purpose and therefore do not qualify as "Eligible Assignees." *See id.* at 12:3-15:3.

C. The Hearings on Confirmation of Debtor's Chapter 11 Plan & the Plan Amendment

Debtor filed the first proposed form of its Plan on March 27 (Bankr. Doc. 62). In response to objections to the initial form of the Plan and related disclosure statement by US Bank and another creditor (*see* Dec. of James L. Day at 1, ¶ 2 (Bankr. Doc. 72)), on April 19, 2013 Debtor filed its pending Plan (Bankr. Doc. 72-1) and Disclosure Statement (Bankr. Doc. 72-2).

The Bankruptcy Court approved the Disclosure Statement pursuant to an order entered on April 26 (Bankr. Doc. 79), set a May 22 deadline for creditors to vote on the Plan (*id.* at 2, ¶ 3), and fixed June 17, 2013 as the date for an evidentiary hearing on confirmation of the Plan, if needed (*id.* at 3, ¶ 6).

Prior to the May 22 deadline for creditors to vote on the Plan, US Bank served on Debtor's counsel both (i) the six individual ballots of the Lenders (including one for each of US Bank, Citizens, Guaranty and each of the three Funds) with respect to their respective interests in

[1] This section concerns certain decisions by the Agent (US Bank) requiring consent of the Lenders holding two-thirds in dollar amount of the Loan, for some actions, and unanimous consent of all of the Lenders, for certain other actions.

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the Loan and (ii) a single ballot cast by it in its capacity as the Agent for the full amount of the Loan. *See* Dec. of Brian A. Jennings at 2, ¶¶ 2-4 (Adv. Pro. Doc. 12). All seven ballots—the six individual ballots of the Lenders and the ballot of US Bank as Agent—were voted to reject the Plan. *See* Jennings Dec. Exhs. A & B (Adv. Pro. Docs. 12-1 & 12-2). Accordingly, both US Bank (*see* Adv. Pro. Doc. 31 at 5) and the Funds (*see* Adv. Pro. Doc. 37 at 4-5) argued in opposition to the Motion for PI/TRO that Debtor could not show a probability of irreparable harm if the Funds were allowed to vote to accept or reject the Plan because even if the Funds' votes were disregarded, there would still be a unanimous vote of the remaining Lenders and the Agent to reject the Plan. In addition, both US Bank (*see* Adv. Pro. Doc. 31 at 5-6) and the Funds (*see* Adv. Pro. Doc. 37 at 4-5) pointed out that Debtor failed to show it would suffer irreparable harm if the Funds were permitted to exercise the rights of Eligible Assignees because Debtor could address any problems of so-called hold-out creditors by asking the Bankruptcy Court, under Section 1129(b) of the Bankruptcy Code, to "cram down" the Plan if the Lenders rejected the Plan.

The day after the Bankruptcy Court issued the written Preliminary Injunction, Debtor filed a Notice of Intent to Amend the Plan. *See* Bankr. Doc. 141 (June 19, 2013). The Notice of Intent to Amend indicated among other things that Debtor would increase the interest rate to be paid to the Lenders under the Plan from 2.75% to 3.5% per annum. *See id.* at 2, ¶ D. The Notice of Intent to Amend also made numerous references to Debtor's primary owner, Evergreen Capital Trust ("***ECT***"), which is also a guarantor of the Loan.

The next day (June 20), one week before the Confirmation Hearing, Debtor filed its Brief in Support of Confirmation (Bankr. Doc. 148). The Brief includes a new term:

> As part of its reorganization plan, the Debtor seeks a temporary injunction restraining any creditor, party-in-interest or any third party from pursuing any officer, director, or shareholder of the Debtor on account of any claim based on a guaranty. The duration of such injunction would be only until eighteen months following the time the Phase I property achieves stabilization.

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Id. at 22:14-17. US Bank has moved to strike this term from the Plan, and the hearing on this motion is set for June 26 at 10:00 a.m., fewer than 24 hours before the scheduled start of the Confirmation Hearing. *See* Motion to Strike Material Modification to First Amended Plan of Reorganization (Bankr. Doc. 154); "Set Hearing" Minute Entry, entered on 6/24/2013 at 1:44 PM PDT).

As a result of the Notice of Intent to amend the Plan and the statement in the Brief in Support of Confirmation, it is no longer clear whether the Lenders (*other than* the Funds) are, or will remain, unanimous in their rejection of the Plan, or what additional plan modifications and related negotiations designed to win or coerce Lender support might occur before the conclusion of the Confirmation Hearing. It also is not clear whether the Confirmation Hearing can be concluded on June 28 if the Motion to Strike is denied and Debtor is allowed to amend the Plan to enjoin the Lenders from enforcing ECT's guaranty of the Loan.

D. The Funds' Request for Stay/Continuance and Basis for Emergency Relief

Considering the close proximity of the issuance of the Preliminary Injunction (June 18) to the start of the Confirmation Hearing (June 27), the typical schedule for briefing and considering the Funds' Motion for Leave to Appeal would not allow this motion to be decided before conclusion of the Confirmation Hearing. As detailed in the Declaration of David Levant filed herewith, counsel for the Funds attempted but was unable to obtain consent from the other parties to a stay of the Preliminary Injunction or continuance of the Confirmation Hearing pending resolution of this motion and/or appeal. And as noted in the Introduction, the Funds also filed with the Bankruptcy Court an expedited Motion for Stay of the Preliminary Injunction or Continuance of Confirmation Hearing, requesting a ruling by June 24. *See* Adv. Pro. Docs. 43 & 44. As of this filing, the Bankruptcy Court has not ruled on that motion.

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II. THE PRELIMINARY INJUNCTION AND RELATED OPINION

A copy of the Bankruptcy Court's June 18, 2013 Preliminary Injunction Order (Adv. Pro. Doc. 39; the "***Preliminary Injunction***") and a certified transcript of the Bankruptcy Court's oral opinion relating thereto are attached as Exhibits 1 and 2 to the supporting Declaration of David B. Levant, filed herewith.

III. QUESTIONS PRESENTED AND RELIEF SOUGHT

A. Motion for Leave to Appeal

The Funds' Motion for Leave to Appeal presents the central question whether, as a matter of Washington law, the phrase "Eligible Assignee" as used in the Loan Agreement means "***any*** commercial bank, insurance company, ***financial institution*** or institutional lender ***approved in writing by the Agent***" (emphases added), as argued by the Funds, US Bank and BofA, or if it means "any commercial bank, insurance company, financial institution ***[that regularly makes loans]*** or institutional lender approved in writing by the Agent," as claimed by Debtor and determined by the Bankruptcy Court.

The Funds request that the Court rule as a matter of law that they are "Eligible Assignee[s]" for purposes of the Loan Agreement and dissolve the Preliminary Injunction.

B. Motion for Stay of Preliminary Injunction

The Funds' Motion for Stay of Preliminary Injunction raises the same question as the Motion for Leave to Appeal and three additional issues in the context of the four-part test for issuance of a stay under Fed. R. Bankr. P. 8005, *i.e.*:

(1) whether the applicant has made a strong showing that it is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and

(4) where the public interest lies.

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For purposes of this Motion, the Funds request that the Court: (1) rule that they have made a strong showing that they are likely to succeed on the merits that they are "Eligible Assignee[s]" for purposes of the Loan Agreement; (2) find that the Funds will be irreparably injured if they are deprived of the right to vote on the Plan; (3) find that a stay of the Preliminary Injunction will not substantially injure Debtor or the other parties interested in the Bankruptcy Case; and (4) hold that the public interest lies in allowing the Funds, as (collectively) the holders of the second largest claim in the Bankruptcy Case, to vote their claims on the Plan.

IV. WHY LEAVE TO APPEAL SHOULD BE GRANTED

A. Legal Standard

Pursuant to 28 U.S.C. § 158(a)(3), district courts have discretion to hear interlocutory appeals from bankruptcy court orders. *See In re Clark*, No. CO9-1373RAJ, 2010 WL 2639842, at *2 (W.D. Wash. June 28, 2010). In determining whether to grant leave, district courts apply the same standard that courts of appeal apply to motions for interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* (citing *In re Burke*, 95 B.R. 716, 717 (BAP 9th Cir. 1989)). Interlocutory review is appropriate when the reviewing court is "of the opinion" that the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of [the] litigation." 28 U.S.C. § 1292(b). Each of these criteria is met here.

B. The Proper Interpretation of "Eligible Assignee" Is a Controlling Question of Law.

As the Bankruptcy Court observed (Tr. at 12:1-2), the critical point at issue between the Debtor on the one hand and US Bank, BofA, and the Funds on the other is whether the Funds are "financial institutions" and therefore qualify as "Eligible Assignees" under the Loan Agreement. If the Funds qualify as "Eligible Assignees," then they enjoy certain rights under the Loan Agreement, including the right to vote to approve or disapprove any Plan presented by the Debtor. Accordingly, the interpretation of the term "financial institution" is determinative of the Funds' rights.

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C. The Bankruptcy Court Misinterpreted the Term "Eligible Assignee."

The Loan Agreement is governed by Washington law (*see* Loan Agreement § 14.15 (Adv. Pro. Doc. 4-1 at 65)), and the Washington courts follow the "objective manifestation" theory of contracts:

> Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable meaning of the words used. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. We generally give words in a contract their ordinary, usual and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We do not interpret what was intended to be written but what was written.

Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005) (quotation marks and citations omitted).

In their initial Objection to the Motion for PI/TRO (Adv. Pro. Doc. 19 at 4-5), the Funds urged the Bankruptcy Court to find that they qualified as "Eligible Assignees" because they met the common legal definition of a "financial institution." Again, the Loan Agreement defines an "Eligible Assignee" in relevant part as "any commercial bank, insurance company, financial institution or institutional lender approved by Agent [US Bank]." *See* Loan Agreement § 1.1 (Adv. Pro. Doc. 4-1 at 9). The Loan Agreement does not further define the term "financial institution." *Black's Law Dictionary* defines "financial institution" as "A business, organization, or other entity that manages money, credit, or capital, such as a bank, credit union, savings-and-loan association, securities broker or dealer, pawnbroker, or investment company." *Black's Law Dictionary* 707 (9th Ed. 2009). *Black's* defines an "investment company," in turn, as "A company formed to acquire and manage a portfolio of diverse assets by investing money collected from different sources." *Id*. at 319.

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Although the Funds cited numerous cases that relied on *Black's* definition of a "financial institution" (*see* Adv. Pro. Doc. No. 32 at 3-6) the Bankruptcy Court rejected the Funds' simple "ordinary meaning" approach to the term for the following reasons:

1. In the Bankruptcy Court's view, because portions of the Revised Code of Washington use the term financial institution in a narrower sense than the *Black's* definition and because Washington law governs the Loan Agreement, the term "financial institution" is ambiguous, and its meaning must therefore be construed according to surrounding contract terms. Tr. at 12:14-18, 13:9-20, 14:4-9.

2. *Black's* definition, the Bankruptcy Court continued, is "so broad that it essentially writes out the need to have any other terms [in the definition of Eligible Assignee]" (*i.e.*, commercial bank, insurance company or institutional lender). Tr. at 13:21-14-3.

3. Applying the *noscitur a sociis* canon of construction, the Bankruptcy Court concluded that the contracting parties intended the term "financial institution" to have a "more restrictive definition" than that in *Black's* and to refer to an entity engaged in the business of *making* loans because "each of the other entities identified in the definition of 'eligible assignee' is an entity which makes loans." Tr. at 14:4-12.

4. The Bankruptcy Court sought to buttress this reasoning by "looking at the purpose of the loan agreement overall," as evidenced by the original assignee Lenders' loaning of funds to the Debtor on a pro rata basis. Tr. at 14:15-21.

Because the Funds "are not in the business of loaning money" but, rather "invest and hold investment assets" (including loans) and because "[t]here are other financial institutions which loan money, such as mortgage bankers and other lenders," the Bankruptcy Court reasoned, the term "financial institution" as used in the Loan Agreement does not refer to the Funds. Tr. at 15:1-13. Therefore, it concluded, none of the Funds qualifies as an "Eligible Assignees." *Id.*

Each link in this chain of reasoning is fatally flawed. *First*, there is no basis to impute the definition of "financial institution" as that term is used in different sections of the Revised Code of Washington to the intent of the parties to the Loan Agreement. Nothing in the Loan Agreement references state statutory definitions as a point of reference for undefined terms such

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as "financial institution." Washington courts regularly rely on dictionary definitions – both *Black's* and standard dictionaries – to ascertain the plain, ordinary, and popular meaning of undefined contract terms. *See, e.g.*, *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994); *Reliable Credit Ass'n, Inc. v. Progressive Direct Ins. Co.*, 171 Wn. App. 630, 640, 287 P.3d 698 (2012). Similar to the definition in *Black's*, the standard dictionary definition is broad. *See, e.g.*, *Webster's Third New International Dictionary* 851 (2002) (defining "financial institution" as "an enterprise specializing in the handling and investment of funds (as a bank, trust company, insurance company, savings and loan company, or investment company)"). Critically, neither *Black's* nor *Webster's* limits the term financial institution to entities regularly engaged in the business of making loans.

Moreover, it is improper to read an ambiguity into a contract term that is otherwise clear and unambiguous. *Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). An ambiguity does not exist merely because the term "financial institution" has a broad meaning and potentially includes other entities listed in the definition of "Eligible Assignee." Accordingly, the Bankruptcy Court erred in concluding that the term was ambiguous.

Second, the Court's critique that "financial institution," as used in the Loan Agreement, must have a narrower meaning than the *Black's* definition because otherwise it would "write[ ] out the need to have other terms" is subject to this very same criticism. Under the Bankruptcy Court's reasoning, which holds that financial institutions must be regular lenders to be Eligible Assignees, the term "institutional lender" would swallow the terms "commercial bank," "insurance company" and "financial institutional."

Further, the words framing the list of different types of "Eligible Assignee" support a broad interpretation of financial institution, not the narrow one announced by the Bankruptcy Court. The definition refers to "***any*** commercial bank, insurance company, financial institution or institutional lender ***approved by Agent in writing*** . . . ." The Bankruptcy Court should have

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found the broad definition of "financial institution" in *Black's* (and also *Webster's*) perfectly consistent with the language "any . . . financial institution . . . approved by Agent in writing."

Third, the Bankruptcy Court's conclusion that the definition of "Eligible Assignee" includes only entities that make loans (as opposed to investing in them) is wrong because it assumes the existence of evidence that was not in the record and ignored information that contradicted its view. Specifically, the Bankruptcy Court assumed without any basis that insurance companies are lenders – like commercial banks and institutional lenders – and therefore that only those sorts of financial institutions that are lenders fit the category of "Eligible Assignee." The Funds directly contradicted the notion that insurance companies are lenders by reference to a recent report prepared by the National Association of Insurance Commissioners, finding that 65% of life insurers *do not even hold* commercial loans. As explained in the NAIC report,

> Commercial mortgage loan investments are concentrated within a relatively small number of insurers, because a significant volume of commercial mortgage loans is necessary to economically justify the infrastructure needed to participate in this asset class. An effective commercial mortgage loan origination effort requires extensive specialized expertise, as well as other resources.

NAIC, *The Insurance Industry's Exposure to Commercial Mortgage Lending and Real Estate: A Detailed Review of the Life Insurance Industry's Commercial Mortgage Loan Holdings (Part II)* at 1 (Oct. 26, 2012) (available at http://www.naic.org/capital_markets_archive/121220.htm). A copy of the NAIC report is attached to the Funds' Reply to Debtor's Supplemental Memorandum as Exhibit 1 (Bankr. Doc. 37-1).

Fourth, the Bankruptcy Court assumed without any evidentiary basis that the purpose of the "Eligible Assignee" definition was focused solely on the funds-advancing period of a loan, completely disregarding the possibility that the term also bears on who could acquire interests in fully-extended and defaulted loans. Although setting terms to advance loan funds to Debtor was certainly a purpose of the Loan Agreement, the Loan Agreement also provided terms for managing the Debtor's obligations and repayment of debt. Nothing in the Loan Agreement

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provided that an entity could not receive an assignment of an interest in the Loan if it did not also extend loan funds. Such a requirement would effectively bar loan assignment after the Loan was fully funded or in default.

In sum, without any evidentiary basis for doing so, the Bankruptcy Court re-wrote the definition of "Eligible Assignee," taking it from "***any*** commercial bank, insurance company, financial institution or institutional lender" to "any ***institutional lender***." As the above discussion shows, this ruling deviates from basic principles of contract interpretation under Washington law. At the very least there is a substantial ground for difference of opinion warranting interlocutory review.[2]

D. Immediate Review Will Advance the Ultimate Termination of the Litigation.

Interlocutory review will promote resolution of the dispute herein because it will determine which parties will be able to vote on confirmation of the Plan. If the Funds are excluded from voting on the Plan, then all parties and the Bankruptcy Court face the possibility of having to restart the plan confirmation process, in the event that the Funds successfully pursue an appeal from final judgment. This waste of resources can be avoided through immediate review of the discrete and straightforward issue of contract interpretation presented here.

V. WHY THE PRELIMINARY INJUNCTION SHOULD BE STAYED

As explained above, the Confirmation Hearing on Debtor's Plan is scheduled to take place later this week on June 27 and 28. There is a possibility that the Confirmation Hearing may be postponed depending on the Bankruptcy Court's ruling on the Funds' Motion for Stay/Continuance and the motion of US Bank to strike Debtor's proposed amendments to the Plan. In the event that the Bankruptcy Court stays enforcement of the Preliminary Injunction or

[2] As the Funds also argued before the Bankruptcy Court (*see* Adv. Pro. Doc. 47 at 4-5) and as is explained in Part V.B *infra*, Debtor failed to establish that it would suffer irreparable harm in the absence of an injunction because Debtor would retain the right to request a "cram down" under Section 1129(b) of the Bankruptcy Code. That the plan confirmation process is judicially supervised is yet another reason why it is improper to disenfranchise the Funds in the face of the plain, ordinary meaning of "financial institution."

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continues the Confirmation Hearing pending appeal, the Funds' rights and interests will not be jeopardized. But if the Confirmation Hearing proceeds as scheduled, the Funds will forever have been stripped of their right to vote on the Plan. Thus, to ensure that they can receive meaningful appellate relief, the Funds request that this Court stay the Preliminary Injunction, pending appeal.

A. Legal Standard

As noted, courts consider four factors when reviewing a motion for stay pending appeal:

> (1) whether the applicant has made a strong showing that it is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;
>
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and
>
> (4) where the public interest lies.

See Leiva-Perez v. Holder, 640 F.3d 962, 964 (9th Cir. 2011); *Stormans Inc. v. Selecky*, 526 F.3d 406, 408 (2008).

These factors are reviewed in "'two interrelated legal tests' that 'represent the outer reaches of a single continuum.' . . . 'At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. . . . At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and the balance of hardships tips sharply in its favor.'" *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983)). Each of these factors weighs strongly in favor of a stay pending appeal.

B. The Funds Are Likely to Prevail on the Merits of the Appeal.

In issuing the Preliminary Injunction, the Bankruptcy Court committed two separate and distinct reversible errors. *First*, as explained above, it misconstrued the term "Eligible Assignee."

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Second, the Bankruptcy Court erroneously found that the Debtor would face irreparable harm without an injunction. *See* Tr. at 15:14-19:20. It is axiomatic that irreparable harm, as Debtor has alleged, exists predominantly in the absence of adequate legal remedies. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 954, 3 L. Ed. 2d 988 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies"); *In re Aerovox, Inc.*, 281 B.R. 419, 433 (Bankr. D. Mass. 2002) ("It is well settled that lack of an adequate remedy at law is a substantial element of irreparable harm"). To the extent an effective remedy is already within reach, preliminary relief is not necessary. *See, e.g., In re Vitro, S.A.A de C.V.*, 455 B.R. 571, 581 (Bankr. N.D. Tex. 2011) (noting that the ability to file bankruptcy constitutes an adequate remedy at law); *cf. Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 21 (2d Cir. 1971) (the ability to file a motion to suppress negates the need for injunctive relief).

One of the extraordinary aspects of this proceeding is that the Preliminary Injunction is expressly intended to prevent the Funds from participating in the judicially supervised plan-confirmation process in which there are clear statutory remedies available to Debtor. In this case a legal remedy is not merely available, it is provided by statute and contemplated in Debtor's Plan. If the Funds attempt to block a consensual confirmation of the Plan under Section 1129(a), the Bankruptcy Court has the power – indeed, the Bankruptcy Court could be compelled by Debtor – to confirm the Plan under Section 1129(b) of the Bankruptcy Code.[3] Debtor's Plan expressly contemplates this possibility, as described in its Disclosure Statement:

> [3] [I]f all of the requirements of [section 1129(a)] other than paragraph 8 [requiring that each class of impaired claims has accepted a plan] are met with respect to a plan, the court, on request of the proponent under the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to the class of claims . . . that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

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> The Bankruptcy Code requires the Bankruptcy Court to find that the Plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the Plan. Upon such a finding, the Bankruptcy Court may confirm the Plan despite the objections of a dissenting class of creditors. Here, the Debtor has requested that the Court confirm the Plan even if creditors holding claims in impaired classes do not accept the Plan.

See Disclosure Statement at 18:1-4 (Bankr. Doc. No. 75). It is hard to imagine a clearer case where an allegedly aggrieved party has a complete adequate "remedy at law."

Debtor has provided no good reason why is cannot avail itself of the tools provided in the Bankruptcy Code for plan confirmation over the objection of dissenting creditors. In addition to the ability to confirm its Plan pursuant to Section 1129(b), Debtor can seek to have the Funds' votes designated pursuant to Section 1126(e) of the Bankruptcy Code, 11 U.S.C. § 1126(e), if it believes they were cast in bad faith. Circumventing these protective mechanisms through injunctive relief was inappropriate.

C. The Funds Will be Irreparably Injured Absent a Stay.

In contrast to Debtor, the Funds face a substantial risk of irreparable injury. If the Plan is confirmed without the Funds' participation, there will not be a second confirmation hearing, the Funds' votes will never be counted and there is no mechanism for the Funds to recover damages or obtain other relief from injury. The Funds' injury is in the loss of their power to vote on the Plan. If a binding vote takes place without the Funds' participation, this injury cannot be remedied.

Without a stay of the Preliminary Injunction, the Funds also face the risk that their appeal will be dismissed as equitably moot. If the Confirmation Hearing goes forward and the Plan is confirmed, Debtor will likely move quickly to consummate the Plan. Once this occurs, Debtor will almost certainly argue that the Funds' appeal should be dismissed based on "equitable mootness" – a prudential doctrine that applies when granting relief is not impossible, but would entail considerable practical difficulty. The doctrine is typically invoked after a plan of reorganization has been confirmed and substantially consummated. *See, e.g., United States Tr. v.*

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Official Comm. of Equity Sec. Holders (In re Zenith Elecs. Corp.), 329 F.3d 338, 340 (3d Cir. 2003) ("the equitable mootness doctrine is to be applied only in order to 'prevent[ ] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract'") (citation omitted). Although the Funds submit that the equitable mootness doctrine cannot properly be applied here in light the Funds' prompt efforts to protect their rights, the risk that it would be applied is real, especially where the Funds would be unable to vote on the terms of a Plan.

D. A Stay Will Not Injure Other Interested Parties.

A stay of the Preliminary Injunction will not injure Debtor or the other parties to its bankruptcy case. The case was commenced primarily in relation to the Loan, which has been outstanding since 2008, was originally supposed to mature in 2009, and has been in default for more than a year already. *See* Disclosure Statement at 4:13-6:5 (Bankr. Doc. 75). Debtor has continued to operate since filing for bankruptcy pursuant to a series of cash collateral orders that have been continued on an agreed basis. *See id.* at 6:9-13.[4] Debtor's property – the Sunrise Village shopping center in Puyallup – is complete, about 75% occupied and profitable. *Id.* at 2:16-3:6. Under the circumstances, the Funds are not aware of any reason why a stay would injure the Debtor or other parties to the bankruptcy case or this adversary proceeding.

E. A Stay Is in the Public Interest.

The right to vote on a plan of reorganization is one of the key rights of creditors in chapter 11 cases. *See In re Heritage Org., L.L.C.*, 376 B.R. 783, 794 (Bankr. N.D. Tex. 2007) ("A right to vote on a plan is a fundamental right of creditors under chapter 11."); *In re Adelphia Comm'ns Corp.*, 359 B.R. 54, 61 (Bankr. S.D.N.Y. 2006) (same). To thwart that right

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[4] A further agreed order appears to be about to be entered on the bankruptcy case docket. *See* "Notice to Court Agreement Reached, Agreed Order to be Submitted on Date of Hearing: 6/26/2013. Filed by James L Day on behalf of Meridian Sunrise Village LLC. (Related document(s)[119] Motion for Use of Cash Collateral)."

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unnecessarily is contrary to the clear purpose and intent of the Bankruptcy Code. The Preliminary Injunction contravenes this fundamental right under the Bankruptcy Code.

There also is a strong public interest in preserving the right of appellate review. *See, e.g., ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.),* 361 B.R. 337, 342 (S.D.N.Y. 2007) ("The ability to review decisions of the lower courts is the guarantee of accountability in our judicial system."). Because of the risk of equitable mootness (*see supra* pages 17-18), a right that may be frustrated in this case if a stay is denied

Finally, in granting the Preliminary Injunction the Court cited the public policy of the State of Washington of enforcing contracts governed by its laws. The public policy, of course, is to enforce them correctly, a public policy which in this case dictates a stay so that the appropriate courts can ensure that the important contract interpretation issue in this case is decided *correctly*.

VI. CONCLUSION

As set forth above, in holding that the Funds are not "financial institutions" and therefore do not qualify as "Eligible Assignees" under the Loan Agreement, the Bankruptcy Court issued an incorrect ruling on a controlling question law. By enjoining the Funds from voting on the Plan, the Court's ruling also will irreparably harm the Funds by stripping them of some of their most important rights as creditors. All of the grounds advanced in support of this Motion were submitted to the Bankruptcy Court. Accordingly, this Court should enter an order (i) granting the Funds leave to appeal from the Preliminary Injunction and (ii) staying the effect of the Preliminary Injunction until the appeal is resolved.

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DATED this 25th day of June 2013.

STOEL RIVES LLP

s/David B. Levant
David B. Levant, WSBA No. 20528
Hunter Ferguson, WSBA No. 41485

Of Attorneys for NB Distressed Debt Investment Fund Limited, NB Distressed Debt Master Fund LP, and Strategic Value Special Situations Master Fund II, L.P.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED at Seattle, Washington, this 25th day of June 2013.

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HONORABLE BRIAN D. LYNCH

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In re: MERIDIAN SUNRISE VILLAGE, LLC, Debtor.	BANKRUPTCY NO. 13-40342-BDL ADVERSARY NO. 13-04225-BDL
MERIDIAN SUNRISE VILLAGE, LLC, Plaintiff, v. NB DISTRESSED DEBT INVESTMENT FUND LIMITED; N.B. DISTRESSED MASTER FUND, L.P.; STRATEGIC VALUE SPECIAL SITUATIONS MASTER FUND II, L.P.; BANK OF AMERICA NATIONAL ASSOCIATION; and U.S. BANK NATIONAL ASSOCIATION, Defendants.	INTERNAL APPEAL NO. T-003 USDC NO. 13-CV-5503RBL DECLARATION OF DAVID B. LEVANT IN SUPPORT OF FUNDS' EMERGENCY MOTION FOR LEAVE TO APPEAL AND FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

I, David B. Levant, declare under penalty of perjury of the laws of the United States that:

1. I have personal knowledge of and am competent to testify to the following facts.

2. I am a partner in Stoel Rives LLP and counsel of record for Defendants NB Distressed Investment Fund Limited, NB Distressed Debt Master Fund LP, and Strategic Value

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Special Situations Master Fund II, L.P. (collectively, the "***Funds***") in the above-referenced adversary proceeding (the "***Adversary Proceeding***"). This Declaration relates to the Funds' Emergency Motion for Leave to Appeal and for Stay of Preliminary Injunction Pending Appeal (the "***Emergency Motion***").

3. Plaintiff-Debtor Meridian Sunrise Village, LLC ("***Debtor***") and the Funds disagree whether the Funds qualify as "Eligible Assignee[s]" under the terms of the Loan Agreement at issue in this matter (the "***Loan Agreement***"), a status that gives the Funds certain rights vis-à-vis Debtor, including the right to vote on confirmation of any Plan of Reorganization for Debtor ("***Plan***").

4. On May 23, 2013, Debtor filed a Motion for Preliminary Injunction or Temporary Restraining Order (the "***Motion***"), seeking to enjoin the Funds from exercising any of the rights of an Eligible Assignee under the Loan Agreement. The Funds filed an Objection to the Motion on May 28, 2013.

5. Following an initial hearing on the Motion on May 29, both Debtor and the Funds filed Supplemental Briefs on June 10 and Reply Briefs on June 13, 2013.

6. On June 17, 2013, the Honorable Brian D. Lynch, U.S. Bankruptcy Judge for the Western District of Washington, read an oral ruling into the record herein containing findings of fact and conclusions of law and setting forth his reasons for granting the Motion. On June 18, the Bankruptcy Court entered a written Order granting Debtor's Motion for Preliminary Injunction (the "***Preliminary Injunction***"). True and correct copies of the Bankruptcy Court's written Order of Preliminary Injunction and the certified transcript of the June 17 hearing are attached hereto as Exhibits 1 and 2.

7. The Preliminary Injunction enjoins the Funds from voting on the Plan. The hearing on confirmation of the Plan (the "***Confirmation Hearing***") is presently scheduled for June 27 and 28.

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8. On June 20, 2013 I emailed counsel for Debtor and the other parties to the Adversary Proceeding, advising them that the Funds had directed me to file a motion for leave to appeal the Preliminary Injunction and requesting that Debtor and the other parties stipulate to a stay or continuance of the Confirmation Hearing pending resolution of the motion for leave to appeal.

9. My email further advised counsel that, assuming one or more of the parties was not willing to stipulate to a stay, the Funds planned to file in the Bankruptcy Court a motion for stay of the Preliminary Injunction or for Continuance of the Confirmation Hearing, pending appeal (as well as a combined motion for leave to appeal and for a stay pending appeal).

10. In the email I indicated that, in light of the imminent Confirmation Hearing and possible witness travel plans, I also planned to file Motions to Shorten Time, requesting (1) that the Bankruptcy Court rule on the Motion for Stay by the end of the day on Monday, June 24, and (2) that the District Court rule on the Motion for Leave and stay by the end of day on Tuesday, June 25. I advised counsel that both the Motion to Stay in the Bankruptcy Court and the Motion for Leave to Appeal are likely to address many of the same issues.

11. Finally, my email requested that, if the parties were not willing to stipulate to a stay, counsel should advise if they would be willing to stipulate to a shortened schedule for ruling and briefing.

12. In response to my email, counsel indicated that Debtor would consider a delay in the Confirmation Hearing only if default rate interest being applied under the Loan Agreement was suspended. Debtor's counsel did not respond to the proposed briefing schedule.

13. Later on June 20, I assisted the Funds in filing a Motion for Stay of the Preliminary Injunction or a Continuance of the Confirmation Hearing, together with a separate Motion to Shorten Time, which requested that the Bankruptcy Court rule on the Motion for Stay of Continuance by the end of the day on Monday, June 24.

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14. Later that night, counsel for Debtor objected to the Motion to Shorten Time (Adv. Doc. 45) on various grounds. There has been no further communication between counsel for the Funds and for Debtor regarding the scheduling of the Funds' Motion to the Bankruptcy Court or their separate Emergency Motion for leave to appeal.

15. At this time the Bankruptcy Court has not ruled on the Motion to Shorten Time or taken any action with respect to the Motion to Stay the Preliminary Injunction or for a Continuance of the Confirmation Hearing.

16. At this time the Confirmation Hearing remains scheduled for June 27 and 28, 2013.

DATED this 25th day of June, 2013.

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By /s/ David B. Levant
David B. Levant, WSBA #20528
Of Attorneys for NB Distressed Debt Investment Fund Limited, NB Distressed Debt Master Fund LP, and Strategic Value Special Situations Master Fund II, L.P.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED at Seattle, Washington, this 25th day of June 2013.

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Entered on Docket June 18, 2013

Below is the Order of the Court.

Brian D. Lynch

Brian D. Lynch
U.S. Bankruptcy Judge
(Dated as of Entered on Docket date above)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

MERIDIAN SUNRISE VILLAGE, LLC, Debtor.	Case No. 13-40342-BDL
MERIDIAN SUNRISE VILLAGE, LLC Plaintiff, v. NB DISTRESSED DEBT INVESTMENT FUND, LTD, et. al, Defendants.	Adversary No. 13-4225-BDL **PRELIMINARY INJUNCTION**

The motion of plaintiff-debtor Meridian Sunrise Village, LLC for a preliminary injunction to enjoin defendants NB Distressed Debt Investment Fund Limited, Strategic Value Special Situations Master Fund II, L.P. and U.S. Bank came on for final hearing on June 17, 2013. All current defendants appeared through counsel.

The Court considered all pleadings filed on the motion and in response, including supporting declarations, and considered the arguments of counsel, the testimony of declarants, the documentary evidence, and the records and files of this case.

An oral ruling was read into the record on June 17, 2013, which is hereby incorporated by reference, containing Findings of Fact and Conclusions of Law for purposes of Fed. R.

Bankr. P. 7052, and setting forth the reasons for the preliminary injunction for purposes of Fed. R. Bankr. P. 7065 and Fed. R. Civ. P. 65(d). It is

HEREBY ORDERED that defendants NB Distressed Debt Investment Fund Limited and Strategic Value Special Situations Master Fund II, L.P. are ENJOINED from exercising their rights under Paragraph 12.9(b) or 11 U.S.C. §1126 in conjunction with the casting of ballots or votes in regard to the confirmation of Debtor's Plan of Reorganization.

It is FURTHER ORDERED that US Bank is ENJOINED from recognizing or treating the assignee Funds as Eligible Assignees for purposes of plan confirmation.

///End of Order///

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN RE: MERIDIAN SUNRISE VILLAGE, LLC, Debtor.	)	13-40342
MERIDIAN SUNRISE VILLAGE, LLC, Plaintiff, v. NB DISTRESSED DEBT INVESTMENT FUND LIMITED; STRATEGIC VALUE SPECIAL SITUATIONS MASTER FUND II, L.P.; BANK OF AMERICA NATIONAL ASSOCIATION; and U.S. BANK NATIONAL ASSOCIATION, Defendants.	)	A13-04225

TRANSCRIPT OF THE DIGITALLY-RECORDED PROCEEDINGS

BEFORE THE HONORABLE BRIAN D. LYNCH

JUNE 17, 2013

PREPARED BY: SHARI L. WHEELER, CCR NO. 2396

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SEATTLE, WASHINGTON; JULY 18, 2012

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THE COURT: The motion of the Plaintiff/Debtor, Meridian Sunrise Village, LLC, which I will refer to as "Meridian" or "the debtor" in this ruling for a preliminary injunction to enjoin the defendants NB Distressed Debt Investment Fund, Limited, hereinafter "NB Distressed," and Strategic Value Special Situations Master Fund II, L.P., which I'll refer to as "SVP" and, collectively, "The Funds" from exercising any of the rights, benefits, and privileges of an eligible assignee under the loan agreement that the debtor has with a syndication of lenders came on for final hearing on June 17th. The debtor seeks a preliminary injunction against Defendant U.S. Bank, as well, as administrative agent for the loan to prohibit U.S. Bank from recognizing and/or dealing with The Funds as eligible assignees.

At the initial hearing on May 29th, the Court requested additional briefing from the parties and set a further hearing for June 17th. All current defendants appeared through counsel. Counsel for The Funds indicated that he would be representing the newest assignee if and when it is added as a defendant to the action.

The Court considered the following pleadings:

Docket Number 2, the motion for a preliminary injunction and the supporting declarations at 3, 4, and 18; U.S. Bank's initial objection at Docket 10 and the declaration in support at Docket 12; The Funds' objection to the motion, Docket 19; the debtor's reply, Docket 20, and the declarations submitted therewith, Dockets 21 and 22; the debtor's supplemental memorandum, Docket 28, and the declarations submitted therewith, Dockets 29 and 30; U.S. Bank's supplemental opposition, Docket Number 31, and declarations therewith; The Funds' supplemental objection, Docket 32, and the declarations therewith; the objection of Bank of America to the motion for preliminary injunction, Docket 33; the debtor's reply to the supplemental memorandum, Docket 34, and the declaration in support thereof; U.S. Bank's reply memorandum at Docket Number 36; and The Funds' reply to the debtor's supplemental memorandum at Docket Number 37.

The Court considered the arguments of counsel and testimony of witnesses by declaration, the documentary evidence, and the records and files of this case. The parties were offered the opportunity to call witnesses and introduce other evidence, but the parties choose to submit the issue on the record before the Court.

The Court finds and concludes as follows:

The Court determines it has jurisdiction over this motion pursuant to 28 USC 1334 and that this is a core

proceeding under 28 USC 157(b)(2)(L), as it regards the confirmation of the debtor's plan of reorganization.

This adversary and the debtor's motion addressed The Funds' eligibility to vote on the confirmation of the debtor's plan, a matter that arises only in a bankruptcy case and is at the heart of a bankruptcy case.

Confirmation of a plan under 11 USC Section 1129 and voting on a plan under 11 USC 1126 are rights arising from the Bankruptcy Code and, therefore, matters which the Court has the power to render final decisions, per Stern versus Marshall.

In their supplemental replies, both U.S. Bank and The Funds concede that to the extent a preliminary injunction relates to confirmation of the debtor's plan, this Court has jurisdiction and the power to enter such an injunction.

With respect to findings of fact, the debtor and the guarantor made an agreement, which I will characterize as "the loan agreement," with U.S. Bank in April of 2008 for a construction loan to develop a shopping mall called Sunrise Village in Puyallup, Washington. The loan was for advances up to 75 million and envisioned that there would be an assignment and syndication of the loan to multiple lenders. U.S. Bank is designated as the agent for the lenders, in addition to its status as the largest single

lender.

The loan agreement contains several provisions that are pertinent to the issues here. The lenders agreed, in paragraph 12.3(b), that no individual lender may enforce or exercise any provisions of the loan agreement, other than through the agent; although any action brought to collect on the loan was to be done by the agent and lenders collectively, per 12.3(e).

Paragraph 12.9 identifies what actions can be taken to modify the loan documents and what consents are required. 12.9(a) provides that the agent can, except as provided in clause (b) below, grant or refuse to grant any consent or approval required or request of it hereunder or under any of the other loan documents in its sole and absolute discretion and consent or refuse to consent to any modification, supplement, or waiver under any of the loan documents.

Paragraph 12.9(b)(i), which the debtor identified at the initial hearing as their greatest concern, states that certain actions cannot be taken without the consent of all lenders, including, among other things, postponement of the maturity date of the loan and decreasing the applicable interest rate, both of which are proposed in the debtor's proposed plan.

Paragraph 12.9(b)(ii) goes on to identify other

actions that can be taken if a required number of lenders, defined elsewhere as 66 2/3 percent, of the proportional shares of the loan consent.

Under paragraph 13.2, any assignment of a lender's interest was restricted to someone who is an eligible assignee. "Eligible assignee" is defined in paragraph 1.1 as any lender or affiliate of lender or any commercial bank, insurance company, financial institution, or institutional lender that is approved by the agent in writing and also by the debtor, provided that the debtor was not then in default.

Lastly, under paragraph 12.16, in the event the debtor filed bankruptcy, the lenders agreed that the agent shall have the sole and exclusive right to file and pursue a joint proof of claim on behalf of the lenders. Each lender irrevocably waives its right to file or pursue a separate proof of claim in any such proceedings.

Shortly after the loan agreement was made in May and June of 2008, 66.667 percent of the loan was assigned to three other lenders. Bank of America received 26.667 percent. Citizens Business Bank received 20 percent, and Guaranty Bank and Trust received 20 percent. Collectively, with U.S. Bank, I refer to them as "The Lenders."

The debtor consented to each of these assignments. At the time the assignments were made, the

debtor had received less than 20 percent of the $75 million loan commitment. So each lender who received the assignment was still liable for advancing further funds, and each assignment agreement states the amount of each lender's unused commitment.

U.S. Bank, as agent for The Lenders, declared the loan in default in early 2012 based upon a nonmonetary default having to do with the debt coverage under the loan agreement but did not apply the default interest rate.

In mid-October 2012, the debtor learned that several of the lenders were looking to sell their positions in the loan. In late October 2012, U.S. Bank approached the debtor on behalf of the lenders, requesting a sixth amendment to the loan agreement, including redefining "eligible assignee" as any person other than borrower or any affiliate of borrower, essentially eliminating any restrictions on assignment under paragraph 13.2.

The debtor would not agree to the amendment. U.S. Bank then advised the debtor that The Lenders intended to exercise their rights as a result of the nonmonetary default, including charging default interest. The debtor was not in default as to any payments of the loan at that time.

The debtor thereafter filed bankruptcy on January 18, 2013. On the petition date, the outstanding balance of the loan was approximately $54,780,000. After the

commencement of the debtor's bankruptcy in March 2013, the debtor was informed that Bank of America had assigned its interest in the loan to NB Distressed.

Approximately nine days later, U.S. Bank informed the debtor that NB Distressed had further assigned 50 percent of its interest to SVP. The debtor's consent to these assignments was not requested. But U.S. Bank, as agent for the loan, has approved the assignments in writing. The debtor contends that The Funds are not eligible assignees under the loan agreement.

During the course of this motion, it was revealed that NB Distressed has further assigned a portion of its interest to a related entity, NB Distressed Master Fund, L.P. That entity is not currently a defendant in this adversary. The debtor has indicated that it intends to amend the complaint to add that assignee as a defendant.

The current alleged percentages of interest in the loan are U.S. Bank, as lender, which holds 33.333 percent; Citizens Business Bank holding 20 percent; Guaranty Bank and Trust holding 20 percent; SVP holding 13.333 percent; NB Distressed holding 10.573 percent; and NBLP holding 2.76 percent.

The Funds have submitted declarations, which are uncontested, describing The Funds' purposes and financial activities. There is no factual dispute that The Funds are

not in the business of loaning or advancing money. Both are described as entities that invest, own holdings, investment vehicles, acquiring and managing assets, making investments, investment advisor with assets under management, buying and holding securities and debt, and investing money. Neither fund has provided any example of a situation where it initiated a loan or undertook a debt with a go-forward open loan commitment.

The debtor submitted excerpts from The Funds' websites regarding the nature of their investment activities. And The Funds did not dispute that those excerpts did, in fact, come from their websites. The excerpts state, for example, that SVP focuses on distressed, deep-value opportunities in middle-market companies where we can typically exert significant influence or, in some cases, obtain outright control, and that it typically takes an active role in transactions, driving a company's restructuring through bankruptcy, participating on a creditors' committee, or driving the strategic and operational direction of the company. SVP further attempts to exert meaningful influence on the restructuring and post-restructuring activities of its investments and will deploy our operating partners as needed. SVP's declaration admits that SVP will acquire and hold real estate as part of its business.

NB Distressed states on its website that it captures once-in-a-generation opportunities in distressed debt, focusing on senior debt backed by hard assets in distressed, stressed, and special-situation investments.

The Court's conclusions of law follow.

The Court must determine whether the debtor has established the following:

First, that the debtor is likely to succeed on the merits of its claims; secondly, that the debtor is likely to suffer irreparable harm in the absence of preliminary relief; third, that the balance of equities tips in the debtor's favor; and fourth, that an injunction is in the public interest. And here, I'm quoting from the Winter case. Regarding the issue of the likelihood of success on the merits, the debtor's complaint in this adversary appears to allege causes of action for declaratory and injunctive relief, both of which are remedies, not claims, but which are based upon allegations of breach of contract.

The debtor avers that Bank of America's assignment to The Funds was improper because The Funds are not eligible assignees, as they do not fall within one of the types of specified entities listed in the definition of eligible assignees in paragraph 1.1.

The parties concede that The Funds are not a commercial bank, insurance company, or institutional lender.

And so the briefing on the motion has been about whether The Funds qualify as a financial institution.

The Funds have urged the Court to adopt the definition of financial institution from Black's Law Dictionary, which defines the words as a business, organization, or other entity that manages money, credit, or capital, such as a bank, credit union, savings and loan association, securities broker or dealer, pawn broker, or investment company.

The debtor contends that the term must be looked at in the context of the document and the other types of entities listed in the definition of "eligible assignee," which are all entities that regularly loan funds.

The debtor notes the Washington statutes and the Bankruptcy Code both have a definition for "financial institution" that is more restrictive than Black's Law Dictionary and limits the term to the lending-type entities it contends were meant.

In fact, the Revised Code of Washington defines "financial institution" over 30 times in the statutes; and with one exception, The Funds would not qualify as a financial institution under those definitions.

As there does not appear to be a dispute about the nature of The Funds' activities, at least insofar as to whether or not they may be characterized as financial

institutions, the Court can decide whether The Funds are financial institutions, as that term is used in the loan agreement, as a matter of law.

The Court would note that there has been a discussion in the briefs about parol evidence, but neither party has sought to introduce parol evidence about the meaning of the term "financial institution" in the loan agreement.

The loan agreement is governed by Washington law, per paragraph 14.15. Washington follows an objective manifestation theory in interpreting contracts, focusing on the objective manifestation of an agreement and imputing the parties' intentions by giving reasonable meaning to the words used. And here, I quote from Hearst Communications versus Seattle Times. The various definitions for "financial institutions" in other sources and statutes, while instructive, are not binding on the Court, as the Court must determine what the term "financial institution" means in the context of the loan agreement. Given the varying notions of the meaning of the term, it is, at a minimum, ambiguous.

The first problem with The Funds' argument about what "financial institution" means in the loan agreement -- its proper definition is so broad that it essentially writes out the need to have any other terms in that sentence -- is that under The Funds' definition of

financial institution, that term alone would already encompass commercial bank, insurance company, or institutional lender.

The other problem is that each of the other entities identified in the definition of "eligible assignee" is an entity which makes loans. The canon of construction known as noscitur a sociis recognizes that when the meaning of a term is ambiguous, the meaning is informed by the other words in the same list in the contract.

This suggests that the intent of the words "financial institution" in the loan agreement is a more restrictive definition, as suggested by the debtor. Moreover, looking at the purpose of the loan agreement overall, it was to make a loan to the debtor.

Each of the lenders undertook its assignment with the purpose of advancing loan funds to the debtor in the amounts of the commitment identified on their assignments. The loan agreement envisioned that U.S. Bank would assign interest in the loan to eligible assignees, who would then fulfill their pro rata share of the loan commitment, which in fact happened.

The assignments to The Funds have not been provided, but there has been no indication that The Funds have agreed to take on any obligation to advance loan funds to the debtor.

The Funds are not in the business of loaning money. They invest and hold the investment assets. This is a different relationship and not one that the Court concludes was contemplated under the loan agreement. There are other financial institutions which loan money, such as mortgage bankers and other lenders, to less than Class A borrowers. The logical interpretation of "eligible assignees" is that those other types of lenders were meant by the term "financial institution," as used in the loan agreement.

Therefore, the Court concludes that The Funds are not eligible assignees under the loan agreement and, therefore, concludes that it is likely that the debtor would succeed on the merits of its claim in this action.

Regarding irreparable harm, the irreparable harm prong makes the Court anticipate what will happen, as a practical matter, following the denial of a stay, as an example. Possible irreparable harm is individualized in each case.

The loan agreement undisputedly limits the debtor to one proof of claim for the loan, clearly stated in paragraph 12.16. Section 1126 provides that the holder of a claim or interest may accept or reject a plan. Therefore, it appears as the debtor's plan is currently structured for Class 2, that there is only one claim for the loan agreement and, therefore, only one vote on the plan that may be cast on

behalf of all the lenders.

The parties raised, in oral argument at the first hearing, the notion that each lender under the loan agreement was entitled to a vote; and, therefore, The Funds could not influence or prevent the other lenders from voting in favor of the plan because each vote would be counted individually under 1126 and 1129. The Court asked for further briefing that this is the case, but no one has provided any legal authority that outweighs the clear language of paragraph 12.16 that there's only one vote to be cast.

U.S. Bank submitted the declaration of James Gradel in Docket Number 27 that describes the loan as a syndicated loan where multiple lenders provide financing. And although the loan is administered by an administrative agent, each lender has a direct contractual relationship with the borrower. However, this doesn't address the impact of either 12.16 or the other provisions of the loan agreement, such as paragraph 12.9, where the lenders have contractually agreed amongst themselves that only the agent shall be the one to act on behalf of all lenders, subject to certain rights retained by all of the lenders.

The debtor has alleged that the harm it faces is that in determining how the vote is cast, The Funds can exercise their rights under paragraph 12.9, and any one of

them, including the entity that only owns 2.76 percent, can force U.S. Bank to reject the plan on a Class 2 ballot, to the extent that the plan impacts any of the rights that require unanimous consent under paragraph 12.9(b), which the plan clearly does, as it proposes to change the interest rate and maturity date of the loan.

The debtor claims that The Funds, as a different type of investment entity, may be motivated not just to recover on their debt like the other lenders, but to try to take over and acquire the Sunrise Village Mall. The debtor claims that this harms its ability to try to negotiate with the lenders and find terms that Class 2 could agree to, forcing it to seek to cram down a plan under 1129(b) in a contested confirmation hearing.

Beyond paragraph 12.16 and Section 1126, case law supports a finding that there is just one vote here but that the agent must cast it in accordance with the required consents of the other lenders, as stated in the loan agreement.

Here, I reference the Rosewood at Providence case, the Mizuho Corp. Bank, Ltd. versus Enron Corp. case, and the Beal Savings Bank versus Sommer cases from the Court of Appeals for the State of New York. Where lenders agree among themselves that an agent shall be the one to take certain actions such as filing a proof of claim, enforcing

the loan agreements, or voting on a plan, only the agent may do so in a debtor's bankruptcy. But the agent still must act subject to the provisions of the agreement, such as taking actions only where the required approval by other lenders is present.

Lastly, as the debtor has noted, even if each lender had the right to cast a vote, there would be six votes in Class 2 of the debtor's plan: three from the original lenders -- U.S. Bank, Citizens, and Guaranty -- and three from The Funds. Section 1126(c) requires approval of two-thirds of the class in dollar value, which the debtor could get by getting votes in favor from the original lenders, and votes of more than half in number of the claims in the class voting. The debtor would have to get four votes in favor of Class 2 to approve. And it cannot do so without getting the vote of at least one of The Funds.

Whether The Funds exercised their power to veto provisions in the plan through paragraph 12.9(b) or under 1126 of the code, in either event, this prejudices the debtor in the confirmation process. Therefore, the Court concludes that the debtor does face likely irreparable harm of having its negotiations with the proper lenders and a potential consensual agreement subject to the veto power of The Funds, which are likely to have different motivations and goals for recovery out of the debtor's reorganization.

While U.S. Bank and The Funds are correct that the debtor is not entitled to a consensual confirmation, the debtor certainly has the right to negotiate with eligible assignees under the loan agreement. And certainly no debtor should be hindered from attempting to reach consensus with its creditors by the presence of an improper party at the table or one there in bad faith.

The Court further finds that this potential harm to the debtor is not one that can be adequately remedied -- an adequately remedied harm with money damages. Let me repeat that sentence. The Court further finds that this potential harm to the debtor is not one that can be adequately remedied with money damages.

While it would be easy to quantify the debtor's time and cost in having to undergo a contested confirmation hearing, it will be nearly impossible for the debtor to show what portion of that is attributable to The Funds, as opposed to the other causes. If the debtor cannot successfully confirm a plan after a contested confirmation hearing, the damages become even more difficult to quantify.

Given that the harm the debtor faces cannot be quantified in damages, and the ability to obtain a consensual plan cannot be fixed later -- cannot be determined later -- excuse me. Given that the harm the debtor faces cannot be quantified in damages, the Court finds that the harm to The

Funds of being prohibited from exercising their rights under paragraph 12.9 as to the voting on the debtor's plan is limited and doesn't outweigh the potential harm to the debtor.

The Funds are still entitled to receive their proportionate distributions under the loan agreement and retain all other rights, benefits, and privileges under the loan agreement pending further resolution of this matter. Moreover, the interest of The Funds in the debtor's obligation, at least insofar as they track that of the other lenders, will be protected by the remaining eligible lenders, including U.S. Bank.

The Court finds that there is a public interest in protecting the confirmation process in bankruptcy that supports granting this limited injunction. The code is replete with provisions that exemplify the desire to maintain good faith in the confirmation process. While postfiling assignments by creditors are common, it is particularly important to protect the provisions of the loan agreement regarding assignments when those assignments take place postpetition.

Indeed, the Court has before it the loan agreement, which clearly addresses what rights The Funds have and reveals how The Funds could prohibit the debtor from obtaining a consensual plan without a lengthy confirmation

hearing on whether the plan can be crammed down under Section 1129(b) even though they may not properly hold rights in the loan agreement. There is a public interest in preserving the contract rights of both borrowers and lenders, which is the intent of the preliminary injunction sought here.

U.S. Bank has argued that Bank of America should be allowed to temporally vote if The Funds are found to be not eligible assignees. I note that B-of-A has not asked for that right. But in any event, it is not for this Court to address the contractual rights between The Funds and B-of-A. If B-of-A wants the right to vote, then it would have to unravel the assignments, which again is a matter of contract between it and The Funds.

Therefore, taking each element of the preliminary injunction requirements in turn, the Court finds that the debtor is likely to succeed on the merits of its claim; that The Funds are not eligible assignees; and that the debtor will likely be irreparably harmed if The Funds are allowed to participate in the voting on Debtor's plan, either under paragraph 12.9 of the loan agreement or pursuant to Section 1126 of the Bankruptcy Code, in that The Funds could force U.S. Bank, as agent, to refrain from submitting a ballot in favor of the plan, or by voting together could prevent the lenders from supporting the plan, at least as to the certain critical plan confirmation issues.

Similarly, if The Funds are allowed to vote under Section 1126, they can effectively veto any agreement worked out between the eligible lenders and the debtor. The equities tip in favor of the debtor under these circumstances. Such harm cannot be undone after the fact because the debtor will likely be unable to prove whether the ineligible assignees are making decisions simply to protect their position as lenders or for other more sinister motives. And it will be highly difficult to determine and quantify money damages if The Funds are allowed to exercise their veto rights.

There is a public interest in the Court protecting both confirmation processes and contractual rights of parties. So the Court will enter a limited preliminary injunction prohibiting The Funds from exercising their rights under paragraph 12.9(b) for purposes of voting on the debtor's plan of reorganization and similarly from voting under Section 1126 of the code.

U.S. Bank is enjoined from treating The Funds as eligible assignees under the loan agreement; although this will not prohibit U.S. Bank from communicating with The Funds.

For the reasons stated below and based on the findings and conclusions made on the record at this hearing, which are hereby incorporated by reference, the Court will

enter an order that Defendants NB Distressed Investment Fund Limited and Strategic Value Special Situations Master Fund II, L.P., are enjoined from exercising their rights under Section 12.9(b) in connection with the casting of ballots or votes in regards to the confirmation of the debtor's plan of reorganization.

It is further ordered that U.S. Bank is enjoined and shall not recognize or treat the assignee funds as eligible assignees for purposes of plan confirmation. This does not prohibit U.S. Bank or the other eligible lenders from communicating with The Funds, but The Funds may not exercise the rights given to the lenders in section 12.9(b), nor may they vote under Section 1126.

While it only became apparent that there had been a further assignment to NBLP during the course of the proceedings on this motion and, therefore, NBLP has not yet been named as a defendant in this action, if and when an amended complaint is filed naming NBLP as a defendant, the terms of this preliminary injunction shall apply to it, as well, as soon as NBLP is served with the complaint, provided, however, that NBLP shall be able to identify such further facts or law that indicate it should not be subject to the same relief by bringing a motion seeking to have the injunction lifted or modified as to NBLP.

Are there any questions?

Mr. Smith?

MR. SMITH: Your Honor, yeah. I'm sorry. Very briefly. I think you said, at an earlier stage, that U.S. Bank would not be enjoined from making payments of pro rata amounts to The Funds.

THE COURT: Correct.

MR. SMITH: Okay. You didn't say it at the very end in the conclusion, but I just want to make sure we are not enjoined from making payments.

THE COURT: The injunction is as limited as I indicated --

MR. SMITH: Through the plan confirmation proceedings?

THE COURT: Yes.

MR. SMITH: Okay. Thank you, Your Honor.

THE COURT: Thank you, Counsel.

Mr. Levant, do you have something you want to add?

MR. LEVANT: I have questions, Your Honor.

THE COURT: You have questions.

MR. LEVANT: First, I appreciate the narrow scope of the preliminary injunction; that it will only be with respect to voting power. And I want to confirm, then, that The Funds may participate with the other lenders, whose status is not disputed, in discussions -- there are frequent

lender calls, communications with counsel -- that the order will only apply to the actual voting under the specified sections of the loan agreement and the plan.

THE COURT: That's correct.

MR. LEVANT: Thank you, Your Honor.

THE COURT: I want to encourage that you be a participant in the discussions. I still have an optimist's view that this matter may be resolved. If it isn't, I'm prepared to proceed.

MR. LEVANT: Well, Your Honor, in fact, that's consistent with our premise or view of the situation, which is excluding our votes won't affect the outcome. And it's very important to The Funds that they know what's going on, whether or not their votes are cast. We don't think it will change the voting.

Your Honor, I also request, with respect to the preliminary injunction and the security provision, whether the Court has considered or ruled on the security required pursuant to Rule 7065?

THE COURT: I have not considered it. I think there's some provision in that section about not necessarily requiring it of debtors. But if you want to request that the Court enter an order requiring security, I'll consider it when you file such a motion.

MR. LEVANT: We will do so. Thank you, Your

Honor.

Thank you. I have no other questions or comments.

THE COURT: All right.

MR. DAY: Your Honor, how does this affect the motion for sharing information that U.S. Bank has brought?

THE COURT: Well, I assume, because I've concluded that they're not eligible assignees, that they're not entitled to the information about the guarantor, except to the extent that you want to otherwise waive it, or your client otherwise waives it for whatever purposes that might serve in the context of the confirmation process.

MR. DAY: Correct. Thank you, Your Honor. And the Court will be getting the order out, as opposed to one of us?

THE COURT: Yes.

MR. DAY: Okay. Thank you, Your Honor.

THE COURT: Thank you, Counsel.

I would add that much as words are known by the company they keep, good lawyers are as well.

(The proceedings were concluded.)

CERTIFICATE

SHARI L. WHEELER certifies that:

The foregoing pages represent a complete transcript of the digitally-recorded proceedings. Some editing changes may have been made at the request of the Court.

These pages constitute the original or a copy of the original transcript of the proceedings to the best of my ability.

Signed and dated this 21st day of June, 2013.

by /s/ Shari L. Wheeler

SHARI L. WHEELER, CCR NO. 2396